

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY A. BEAVER,

Appellant.

No. 38557-1-II

UNPUBLISHED OPINION

Hunt, J. — Anthony A. Beaver appeals his 365-day sentence for unlawful use of drug paraphernalia. He argues that the trial court erroneously characterized this offense as a gross misdemeanor, instead of a misdemeanor, which carries a sentencing range of only 0 to 90 days. Conceding this error, the State agrees that we should remand for resentencing. In his Statement of Additional Grounds (SAG),¹ Beaver challenges his jury convictions for possession of a controlled substance and unlawful use of drug paraphernalia. He argues that his trial counsel provided ineffective assistance and asks whether an inaccurate statement by a State’s witness raises a “totality of the circumstances” issue.

Accepting the State’s concession of the sentencing error, we vacate Beaver’s one-year sentence for possession of drug paraphernalia and remand to the superior court for resentencing. We affirm his convictions.

¹ RAP 10.10.

Facts

At about 10:20 pm on August 28, 2007, Sean Uhlich, Vader Chief of Police, recognized a passing red and gray truck as one routinely driven by Anthony Beaver. Uhlich knew Beaver through previous contacts. A vehicle license plate check recovered Beaver's driver's license number, which Uhlich apparently used to check Beaver's licensing and warrant status. Based on this information,² Uhlich stopped Beaver's truck, placed him under arrest, and read him his *Miranda*³ rights.

Beaver told Uhlich that he understood his *Miranda* rights and agreed to answer Uhlich's questions. When Uhlich asked whether everything in the truck was his, Beaver said, "Yes," except for the global positioning system (GPS), which he said he had gotten at a garage sale. The GPS's battery compartment contained a small packet of crystalline powder, methamphetamine. The State charged Beaver with possession of a controlled substance and unlawful use of drug paraphernalia.

At trial, Uhlich testified initially that he had obtained Beaver's driver's license number when he used his laptop to check the truck's registration. Beaver moved to dismiss the charges, arguing (1) that Uhlich could not possibly have obtained Beaver's driver's license number in the manner described because the truck was registered to Beaver's wife, not to Beaver; (2) that because the vehicle was registered to Beaver's wife, the truck's contents, namely the

² In his SAG, Beaver suggests that Uhlich stopped him for driving with a suspended license. When Beaver's counsel objected to admission of this evidence at trial, however, the court struck it from the record.

³ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

methamphetamine and the paraphernalia, did not belong to him; and (3) that, therefore, Beaver could not have possessed these illegal items. The trial court denied the motion to dismiss, reasoning that Beaver was either in actual or constructive possession of the truck and its contents, regardless of whether he actually owned the truck.⁴

Under further questioning and cross examination, Uhlich admitted that he had made a mistake when he testified that he had obtained Beaver's driver's license number from the vehicle registration. Uhlich clarified that he had retrieved Beaver's driver's license number from a different police record system, the Spillman System,⁵ not linked to the Department of Licensing. In closing argument, however, Beaver's counsel used Uhlich's statement that he had gotten the driver's license number from the vehicle registration to question Uhlich's credibility.

A jury found Beaver guilty as charged. The trial court sentenced him to concurrent sentences of one year and a day for the controlled substance conviction and 365 days for the drug paraphernalia conviction.

Beaver appeals both his convictions and his sentence for unlawful use of drug paraphernalia.

Analysis

I. Sentencing Error

⁴ Beaver specifically chose not to argue that his arrest had been illegal because, although Uhlich had not actually obtained Beaver's driver's license from the truck's vehicle registration, as Uhlich first claimed, the source Uhlich would actually have used, the Spillman System, would have produced Beaver's driver's license number.

⁵ The Spillman System contains a record of vehicle "owners" input by police officers based on who has driven a particular vehicle in the past.

As Beaver correctly contends and the State concedes, unlawful use of drug paraphernalia is a misdemeanor, carrying a maximum sentence of 90 days confinement. RCW 69.50.412(1); RCW 9A.20.021(3). We accept the State's concession that the trial court erred in imposing a 365-day gross misdemeanor sentence for this misdemeanor conviction. RCW 9A.20.021(2).

II. SAG

In his SAG, Beaver challenges his convictions, raising two issues. First, he appears to argue that his trial counsel provided ineffective assistance in failing to move to suppress the evidence found in the search incident to his arrest, which Beaver contends was an illegal search. Second, he argues generally that the inaccuracy of Uhlich's testimony about the vehicle's registration raises an issue about the "totality of the circumstances." Both arguments fail.

A. Effective Assistance of Counsel

Counsel's legitimate trial strategy or tactics cannot provide a basis for a claim of ineffective assistance of counsel. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). In order to constitute ineffective assistance of counsel, counsel's performance must (1) be deficient and (2) prejudice the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance is that which "falls below an objective standard of reasonableness." *State v. Horton*, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003).

We begin with a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. To establish prejudice, the defendant must show that counsel's performance was so inadequate that there is a reasonable probability that, given competent counsel, the result would have differed, thereby undermining our confidence in the trial outcome and requiring that it begin anew. *Strickland*, 466 U.S. at 694.

Beaver bases his claim of ineffective assistance on defense counsel's failure to move to suppress evidence that was the product of an illegal search. But nothing in the record suggests that Beaver's arrest and the resulting search were illegal. Although Uhlich incorrectly testified initially that he had obtained Beaver's driver's license number from his vehicle registration, Uhlich corrected the error and explained that he had gotten Beaver's driver's license number from the Spillman System, which, as defense counsel recognized, would have contained Beaver's driver's license number. We note that the record does not show the specific reason for Uhlich's stopping Beaver's truck and arresting him after running Beaver's driver's license through the Spillman System; nevertheless, the record contains uncontradicted testimony that Uhlich did have a system-based reason for doing so.

Furthermore, contrary to Beaver's argument, his trial counsel did not ignore Uhlich's inaccurate testimony.⁶ Rather, defense counsel used the fact that the truck was registered to Beaver's wife to argue that Beaver was not in possession of the truck or the methamphetamine and paraphernalia the truck contained. Defense also challenged Uhlich's truthfulness in closing argument.

None of the rules of evidence allow exclusion of evidence found in a search incident to arrest simply because "the arresting officer has made an inaccurate statement." At most, the inaccuracy could raise a question about the witness's credibility; but a witness's credibility is for

⁶ According to Beaver,

The officer testified that he saw my truck and obtained my full name and date of birth thru Department of Licensing and then had dispatch check my driver status and found that my driver's license was suspended. He lied. The truck was not registered to me. I told my attorney this and he failed to file a motion to suppress the evidence.

SAG at 1.

the finder of fact to determine, not the appellate courts. *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). Thus, Beaver cannot show that the trial court would have granted a defense motion to suppress the evidence based on Uhlich's inaccurate statement.

Accordingly, Beaver fails to satisfy the first prong of the ineffective assistance of counsel test, deficient performance. Because the absence of one prong of the test defeats an ineffective assistance of counsel claim, *Strickland*, we do not address the second, prejudice prong. Thus, Beaver's ineffective assistance of counsel claim fails.

B. "Totality of the Circumstances"

Beaver next argues that the inaccuracy in the arresting officer's testimony raises an issue of the "totality of the circumstances." We reiterate that the jury, as finder of fact, is the sole and exclusive judge of the evidence, the weight to be given to it, and the witnesses' credibility. *Bencivenga*, 137 Wn.2d at 709. We will not disturb the jury's credibility determinations on appeal. Thus, this argument also fails.

We affirm Beaver's convictions, vacate his one-year sentence for unlawful use of drug paraphernalia, and remand for resentencing on that count.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Houghton, P.J.

Quinn-Brintnall, J.